

In the Matter of the Compensation of
MICHAEL LUCE SR., Claimant

WCB Case No. 21-03180

ORDER ON REVIEW

Bennett Hartman Morris & Kaplan, Claimant Attorneys
TriMet General Counsel, Defense Attorneys

Reviewing Panel: Members Ceja and Curey.

The self-insured employer requests review of Administrative Law Judge (ALJ) Ogawa's order that set aside its denial of claimant's occupational disease claim for bilateral foot conditions (metatarsalgia). On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation to address the employer's argument regarding Dr. Anderson's opinion.

The ALJ found that the record persuasively established that claimant's occupational disease claim was compensable. In reaching that conclusion, the ALJ found that the opinion of Dr. Corpron, a treating podiatrist, was more persuasive than that of Dr. Zilkoski, an orthopedist who examined claimant at the employer's request.¹ Accordingly, the ALJ set aside the employer's denial.

On review, the employer contends that Dr. Anderson's opinion, which does not support compensability, is persuasive. Based on the following reasoning, we are not persuaded by Dr. Anderson's opinion.

Dr. Anderson, an occupational medicine physician, opined that the major contributing cause of claimant's metatarsalgia was not his work, but, rather, obesity and extensive walking outside of work. (Exs. 19-1, 25-15). He stated that claimant weighed 319 pounds and that he reported worsening foot pain in April 2021 when he began walking more. (Exs. 19-1, 25-15-16, -21).

However, Dr. Anderson did not have a complete understanding of claimant's walking or symptoms. Specifically, claimant testified that he was not an avid walker. (Tr. 16). Although claimant reported worsening foot pain in April 2021 with increased walking, he explained that he began walking on a local track in April 2021 because he thought it would help with his foot condition, but that he stopped after a physical therapist advised against it. (Ex. 3-2; Tr. 20, 28-29). In

¹ We adopt the ALJ's reasoning and conclusions regarding the opinions of Dr. Corpron and Dr. Zilkoski.

addition, claimant testified, without rebuttal, that his foot symptoms worsened when working (*i.e.*, repetitively pushing the turn signal buttons and gas and brake pedals with his feet) and improved when not working. (Tr. 17-19, 23-24). Under such circumstances, we find that Dr. Anderson's opinion was not based on a sufficiently complete or accurate history. *See Miller v. Granite Construction Co.*, 28 Or App 473, 478 (1977) (physician's opinion that was based on an incomplete or inaccurate history was not persuasive); *Eric Cooke*, 74 Van Natta 457, 472-73 (2022) (same).

Further, Dr. Anderson's opinion was conclusory and not well explained. Although he referenced gravity, claimant's weight, and literature correlating weight and foot problems, he did not sufficiently explain how claimant's weight and walking contributed more than his work activities (*i.e.*, the significant, repetitive force of claimant pressing the gas, brake, and turn signals with his forefoot, as persuasively advanced by Dr. Corpron). (Exs. 19-1, 25-15-16; 26-11-15, 16-19, -22, -33-34). Thus, we are not persuaded by Dr. Anderson's opinion. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Shan-Ai Kwong*, 74 Van Natta 31, 31-32 (2022) (physician's opinion that did not sufficiently explain how the claimant's work activities were not causative was unpersuasive).

Moreover, Dr. Anderson concurred with Dr. Zilkoski's opinion. (Ex. 17A). Because we find Dr. Zilkoski's opinion to be unpersuasive (for the reasons stated in the ALJ's order), we likewise discount Dr. Anderson's opinion.² *See Joel R. Hopson*, 72 Van Natta 958, 965 (2020) (physician's opinion that concurred with another physician's opinion that was found unpersuasive was likewise unpersuasive).

Consequently, for the aforementioned reasons and those articulated in the ALJ's order, we find that the record persuasively establishes that claimant's occupational disease claim is compensable.³ *See* ORS 656.266(1); ORS 656.802(2)(a). Accordingly, we affirm the ALJ's order.

² The employer contends that Dr. Anderson's opinion is entitled to deference because he treated claimant on three occasions. *See Weiland v. SAIF*, 64 Or App 810, 814 (1983) (greater weight given to a treating physician's opinion because of a better opportunity to evaluate the claimant's condition). However, for the reasons explained above, we decline to defer to Dr. Anderson's opinion. *See Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001) (treating physician may be given more or less weight based on the record); *Robert J. Cully*, 72 Van Natta 721, 723 (2020) (declining to defer to treating physician's opinion where the opinion was otherwise unpersuasive).

³ For the reasons set forth in the ALJ's order, we find that Dr. Corpron's opinion persuasively establishes that claimant's work activities were the major contributing cause of his bilateral metatarsalgia.

Claimant's attorney is entitled to an assessed fee for services on review. *See* ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$6,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, the risk that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated June 1, 2022, is affirmed. For services on review, claimant's attorney is awarded \$6,500, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on January 6, 2023